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No. 97-1575

In the Supreme Court of the United States

OCTOBER TERM, 1997

PERRY VON MURDOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly determined not to be a member of the Ute Indian Tribe, and thus to be subject to prosecution under 18 U.S.C. 1165 for hunting on tribal trust lands without lawful authority or permission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 132 F.3d 534. The opinion of the district court (Pet. App. 17a-37a) is reported at 919 F. Supp. 1534.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1997. A petition for rehearing was denied on December 22, 1997. Pet. App. 38a. The petition for a writ of certiorari was filed on March 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in the United States District Court for the District of Utah, upon a plea of nolo contendere, of hunting on Indian land without lawful authority or permission, in violation of 18 U.S.C. 1165. He was sentenced to 30 days' probation and a $200 fine. He challenged his conviction on appeal on the ground that he was an Indian with the inherent right to hunt on tribal lands. The United States Court of Appeals for the Tenth Circuit rejected that argument and affirmed the conviction.

1. In 1954, Congress adopted the Ute Partition and Termination Act (UTA), 25 U.S.C. 677 *et seq.*, as part of its policy, since abandoned, to terminate the trust relationship between the federal government and the Indian Tribes. See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) ("it is the policy of Congress, as rapidly as possible * * * to end [the Indians'] status as wards of the United States"). The UTA reflected the policy choices of both Congress and the Ute Indian Tribe. "The [UTA] was the result of proposals initiated by the tribe itself. * * * The tribe also drafted the Act." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 143 (1972) (citing H.R. Rep. No. 2493, 83d Cong., 2d Sess., 2 (1954) and S. Rep. No. 1632, 83d Cong., 2d Sess., 7 (1954)).

Instead of terminating federal supervision over an entire Tribe, as did many of the termination statutes,[1] the UTA terminated federal supervision only over the so-called "mixed-blood" members of the Ute Indian

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[1] The various termination statutes, enacted primarily between 1954 and 1956, are identified in *Affiliated Ute Citizens*, 406 U.S. at 133 n.1.

Tribe.[2] The "full-blood" members were to remain, at least for the time being, as a Tribe under federal supervision.[3] The Tribe proposed that approach, and Congress accepted it, because the mixed-blood Utes, as a group, believed that they were ready to assume full responsibility for their property, while the full-blood Utes did not. As explained in a letter from the Assistant Secretary of the Interior included in the House Report:

> The mixedblood group believes that its members are ready for a termination of Federal supervision over their property, and the fullblood group believes that its members are not ready. The Indians have therefore agreed to divide their tribal assets between the two groups, to propose a terminal program for the mixedblood group, and to propose a development program for the fullblood group that will accelerate the process of preparing them for a terminal program at a later date.

H.R. Rep. No. 83-2493, at 3; see *Ute Indian Tribe* v. *Probst*, 428 F.2d 491, 498 (10th Cir. 1970) (noting that "[t]he legislative history shows that the mixed-bloods desired termination of federal supervision").

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[2] The court of appeals recognized (Pet. App. 2a n.1), as did this Court in *Affiliated Ute Citizens*, 406 U.S. at 133 n.3, that the term "mixed-blood" may be considered offensive. Because the term is used in the UTA, however, the court of appeals used it for purposes of clarity. We do so as well.

[3] Although the UTA contemplated that federal supervision would eventually be terminated over the entire Ute Indian Tribe, no such termination has occurred or is anticipated, given that federal policy no longer favors termination. See *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986).

In order to implement that approach, the UTA established a procedure for the creation of a tribal membership roll, which listed the full-blood and mixed-blood members of the Tribe.[4] 25 U.S.C. 677g. Once the roll had been completed and published in the Federal Register, the tribal assets were to be divided pro rata among the full-blood and mixed-blood Utes. 25 U.S.C. 677i.[5] The mixed-blood Utes would then be able to dispose of the assets that they received, initially subject to the approval of the Secretary of the Interior and thereafter without any federal supervision. 25 U.S.C. 677n, 677o. After the removal of federal restrictions on the property of each mixed-blood Ute, the Secretary was to "publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated." 25 U.S.C. 677v. The individual then would "not be entitled to any of the services per-

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[4] Under the Act, the "full-blood" members were those individuals with at least "one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half." 25 U.S.C. 677a(b). "Mixed-blood" members were those who either did not possess sufficient Indian or Ute Indian blood to qualify as "full-blood" members or who chose to be treated as "mixed-blood" members after having been initially classified as "full-blood" members. 25 U.S.C. 677a(c), 677c.

[5] The tribal assets subject to division among the 1,804 members included $20,702,885 in cash, accounts receivable, and land. H.R. Rep. No. 2493, *supra*, at 2. Those tribal assets that were not susceptible of "equitable and practicable distribution" —such as oil, gas, and mineral rights—would continue to be held in trust by the United States and would be jointly managed by the Tribal Business Committee and the mixed-blood group's representative, the Ute Distribution Corporation. 25 U.S.C. 677i, 677g. See *Affiliated Ute Citizens*, 406 U.S. at 133-139.

formed for Indians because of his status as an Indian," would not be subject to any "statutes of the United States which affect Indians because of their status as Indians," and would be subject to "the laws of the several States * * * in the same manner as they apply to other citizens within their jurisdiction." *Ibid.*

As originally enacted, Section 5 of the UTA provided that the Ute Indian Tribe "shall thereafter consist exclusively of full-blood members" and that "[m]ixed-blood members shall have no interest therein except as otherwise provided in this Act." UTA, Pub. L. No. 671, § 5, 68 Stat. 868 (codified as amended at 25 U.S.C. 677d). In 1955, the Solicitor of the Department of the Interior issued an opinion construing those provisions as superseding the Tribe's authority to define the criteria for membership. Dep't of Interior Solicitor's Opinion of Sept. 6, 1955 (*reprinted in* 2 Op. Sol. on Indian Affairs 1690 (1979)). Congress acted swiftly to reverse that interpretation and "to make it clear that the Ute Tribal Constitution governs membership, not the 1954 Act." *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1030 (D. Utah 1985). Section 5 of the UTA was amended to provide that "[n]ew membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder." Act of Aug. 2, 1956, Pub. L. No. 920, § 1, 70 Stat. 936 (codified at 25 U.S.C. 677d). In addition, Section 8 of the UTA was amended to clarify that "this Act shall not be construed as * * * preventing future membership in the tribe, after the date of enactment of this Act, in the manner provided in the

constitution and bylaws of the tribe." § 2 (codified at 25 U.S.C. 677g).[6]

The United States ended its supervision of the mixed-blood Utes and terminated its trust relationship with them on August 24, 1961. Ute Termination Proclamation, 26 Fed. Reg. 8042 (1961). See *Affiliated Ute Citizens*, 406 U.S. at 149-150 (noting that Ute Termination Proclamation effected "the termination of federal supervision over the trust and restricted property of the mixed-bloods").

2. Petitioner was born in 1968 to two mixed-blood Utes who lived on the Tribe's Uintah and Ouray Reservation. Petitioner's parents had been listed on the final roll of mixed-blood Utes published in the Federal Register on April 5, 1956,[7] and had subsequently received their respective shares of tribal property. The federal government's supervision of

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[6] From 1956 until 1983, the Secretary of the Interior took the position that the UTA, as amended in 1956, did not impose a particular blood-quantum requirement for tribal membership and that the Tribe had the authority to determine its own membership criteria. *Chapoose*, 607 F. Supp. at 1031. In 1983, however, the Secretary concluded that only "full-blood" Utes, as defined in the UTA, could be members of the Tribe, and therefore refused to approve a tribal ordinance that would have enrolled in the Tribe persons who did not meet the UTA criteria. *Chapoose*, 607 F. Supp. at 1028. The district court in the *Chapoose* case set aside the Secretary's disapproval of the ordinance and issued a declaratory judgment that the UTA does not abrogate the Tribe's power to control its own membership. *Id.* at 1037. The Secretary did not appeal that decision.

[7] According to the final mixed-blood roll, petitioner's father, Colin Murdock, had three-eighths Ute blood, and petitioner's mother, Laura Jane Hackford Murdock, had one-eighth Ute blood. 21 Fed. Reg. 2208, 2210 (1956).

petitioner's parents was formally ended in 1961 by the Termination Proclamation. Pet. App. 3a, 21a-22a, 68a.

The Tribe has never considered petitioner to be a member. At the time of petitioner's birth, the Tribal Constitution provided that membership in the Tribe extended only to "children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children." Pet. App. 57a, Ute Tribal Const., Art. II, § 1(b). As a result of the UTA, petitioner's parents had ceased to be members of the Tribe in 1956, and thus did not transmit membership to him under the Tribal Constitution. Pet. App. 3a-4a; see also Pet. 12 (acknowledging that petitioner's parents ceased to be members of the Tribe in 1956).

In 1979, petitioner applied for membership in the Tribe. Pet. 14; Pet. App. 69a. The Tribe never acted on his membership application, either favorably or unfavorably, and never placed his name on its membership roll. Pet. App. 69a.

In 1993, petitioner applied to the tribal Fish and Wildlife Department for a big game permit for the 1993 hunting season. At that time, the hunting of big game, such as elk, on tribal lands was regulated jointly by the Tribe and the mixed-blood Utes' representative, the Ute Distribution Corporation (UDC). Under the 1993/94 Ute Tribe/UDC Big Game Proclamation, only tribal members and "terminated Utes" (*i.e.*, persons listed on the final roll of mixed-blood Utes published in 1956) could obtain permits to hunt big game on tribal lands. Petitioner was neither. The Fish and Wildlife Department therefore did not consider his permit application. Pet. App. 4a, 21a-22a, 68a.

On October 2, 1993, a tribal conservation officer apprehended petitioner in possession of a five-point elk, which he had shot within the boundaries of the Uintah and Ouray Reservation on land that is held in trust by the United States for the Tribe. Petitioner had no tag, license, or permit to shoot the elk. He had taken the elk in an area that he knew to be on tribal lands within the Reservation. Pet. App. 4a, 68a.

3. Petitioner was charged in a one-count misdemeanor information with hunting on Indian land without lawful authority or permission, in violation of 18 U.S.C. 1165.[8] Pet. App. 22a. The United States moved for a determination of petitioner's Indian status and thus of his amenability to prosecution under Section 1165; petitioner moved to dismiss the information on the ground, *inter alia*, that he has an inherent right to hunt on tribal land notwithstanding the UTA.

The district court held that petitioner is not "a member of the Ute Indian Tribe under its Constitution and the requirements imposed by the Ute Tribe as to its membership." Pet. App. 27a. The

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[8] 18 U.S.C. 1165 provides:

> [w]hoever, without lawful authority or permission, willfully, and knowingly goes upon any land that belongs to any Indian or Indian tribe, band or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

court therefore concluded that petitioner was subject to prosecution under 18 U.S.C. 1165.[9]

The district court rejected petitioner's argument that he has a right to hunt on tribal lands "because he is a member or a descendant of persons who belonged to the Uintah Band of Ute Indians," one of three Bands that united in 1937 to form the Ute Indian Tribe of the Uintah and Ouray Reservation. Pet. App. 27a-30a. The court, like the government, agreed that no member of the Ute Tribe, whether full-blood or mixed-blood, lost the right to hunt or fish on tribal lands as a result of the UTA. *Id.* at 28a. The court nonetheless held that such rights were personal to the individual member and did not descend to children who were never members of the Tribe. *Id.* at 28a-29a.

The district court also rejected petitioner's constitutional challenges to the UTA. The court held that the UTA does not violate the equal protection component of the Fifth Amendment in treating full-blood Utes differently from mixed-blood Utes. Pet. App. 34a-35a. The court further held that the UTA does not violate petitioner's First Amendment right of association, noting that "the Ute Tribe has the right to set its own membership requirements" and thus to exclude petitioner. *Id.* at 36a & n.21.

On August 21, 1996, petitioner entered a conditional nolo contendere plea to the misdemeanor information pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. He reserved the right to appeal

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[9] The Ute Indian Tribe filed a brief *amicus curiae* in the district court supporting the government's position that petitioner is not a member of the Tribe and has no right to hunt on tribal lands.

any issues previously decided by the district court. Pet. App. 67a-69a.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-17a.

The court of appeals rejected petitioner's claim that "he is a member of the [Ute] Tribe and therefore has an inherent right to hunt, and fish on the reservation." Pet. App. 4a. The court determined that petitioner "has never been a member" of the Tribe, and "is not eligible for membership under either the requirements [of the Tribal Constitution] in effect at his birth or as amended." *Ibid.* The court explained that "[b]ecause [petitioner's] parents were not members of the Tribe at the time of his birth, he did not become a member pursuant to the Ute Tribal Constitution in effect at the time." *Id.* at 12a. Nor had petitioner "subsequently met the Tribe's requirements for membership"—requirements that the Tribe has a "sovereign right" to establish. *Ibid.*

The court of appeals concluded that the Ninth Circuit's decisions in *Kimball* v. *Callahan*, 493 F.2d 564, cert. denied, 419 U.S. 1019 (1974), and *Kimball* v. *Callahan*, 590 F.2d 768, cert. denied, 444 U.S. 826 (1979), did not support petitioner's claim of a right to hunt on tribal lands. Pet. App. 6a-11a. Those cases held, among other things, that descendants of individuals who had withdrawn from the Klamath Tribe for purposes of the Klamath Termination Act retained the right to hunt and fish on tribal lands. The court distinguished those cases as "resting on the fact" that the descendants possessed the hunting and fishing rights "*through their own continued membership in the Klamath Tribe*," not through the previous membership of their forbearers. Pet. App.

11a. Petitioner, in contrast, was never a member of the Ute Indian Tribe.[10]

Second, the court of appeals held that the UTA's distinctions between mixed-blood Utes and full-blood Utes do not violate the equal protection component of the Fifth Amendment. Pet. App. 15a-16a. The court, relying on *United States* v. *Antelope*, 430 U.S. 641, 645 (1977), recognized that federal legislation with respect to Indian Tribes "is not based upon impermissible racial classifications" and thus is not subject to strict scrutiny. Pet. App. 15a. The court concluded that Congress had a rational basis for treating the mixed-blood Utes and the full-blood Utes differently in pursuing its goal of ending federal supervision over the Indian Tribes: Congress determined that the two groups were not "similarly situated with respect to their ability to manage their own affairs," because the mixed-blood Utes "were approaching the point at which federal supervision over them could be ended," while the full-blood Utes were not. *Ibid.*

Finally, the court of appeals rejected petitioner's arguments that the UTA violates his First Amendment rights and those of the Ute Indian Tribe. Pet. App. 16a. As for petitioner's contention that the UTA "prevents him from expressing his own First Amendment right to identify with the Tribe," the court

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[10] In addition, the court of appeals held that petitioner had no fishing or hunting rights as a descendant of members of the Uintah Band as distinct from the Ute Tribe. Pet. App. 14a. The court explained that the Uintah Band "ceased to exist separately outside the Ute Tribe" in 1937, when the Uintah Band joined with the Whiteriver Band and the Uncompahgre Band to form the Ute Indian Tribe of the Uintah and Ouray Reservation. *Id.* at 13a-14a.

explained that petitioner was prevented from participating in tribal affairs *not* by the UTA but by "the Tribal Constitution's definition of those who may be Tribal members." *Ibid.* The court noted that the UTA "did no more than allow the Tribe to establish its own criteria for membership, under which [petitioner] is not a member of the Tribe." *Ibid.* As for petitioner's contention that the UTA "interfered with the internal affairs of the Tribe and altered its philosophical cast," the court concluded that petitioner does not have standing to assert an infringement of the Tribe's First Amendment rights. *Ibid.*

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any other court of appeals, and does not present any issue of recurring significance. This Court's review therefore is not warranted.

1. The petition rests on the erroneous premise that it is the Ute Partition and Termination Act (UTA), 25 U.S.C. 677 *et seq.*, alone that bars petitioner from membership in the Ute Indian Tribe and from the right to hunt on tribal lands within the Uintah and Ouray Reservation. See, *e.g.*, Pet. 21 (asserting that the UTA "is the only barrier between [petitioner] and full citizenship" in the Tribe). But the UTA addresses only the criteria for membership in the Tribe as of April 5, 1956, the date of publication in the Federal Register of the final membership rolls of full-blood and mixed-blood Utes. 25 U.S.C. 677d. The UTA expressly provides that "[n]ew membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and

ordinances enacted thereunder." *Ibid.*; see also 25 U.S.C. 677g (the UTA is not to be construed "as preventing future membership in the tribe * * * in the manner provided in the constitution and bylaws of the tribe").

By the time that petitioner was born in 1968, the Ute Indian Tribe, not the UTA, governed whether he was entitled to tribal membership. The Tribe was not barred by the UTA from extending membership to petitioner—or, for that matter, from restoring membership to his parents—through its own Constitution, bylaws, and ordinances. But the Tribe did not do so.[11] Petitioner is thus aggrieved not by the UTA, but by the Tribe's own regulations regarding membership, which are not at issue here.

Accordingly, even if the Court were to accept petitioner's arguments with regard to the construction or the constitutionality of the UTA, petitioner would not automatically be entitled to membership in the Tribe. As this Court has recognized, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978). Indeed, petitioner concedes (Pet. 25) that Indian Tribes enjoy "the same autonomy and self-government concerning membership that we enjoy in our own social clubs, organizations, and even religions,"

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[11] To the contrary, in 1958, the Tribe further restricted the criteria for tribal membership, requiring new members of the Tribe to have five-eighths, rather than the previous one-half, Ute blood. *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1031 (D. Utah. 1985).

and thus cannot be judicially compelled to admit an individual to membership.[12]

In short, petitioner's arguments about the construction and the constitutionality of the UTA have little, if any, bearing on the validity of his conviction because the UTA does not control whether petitioner is entitled to membership in the Tribe. This Court ordinarily does not grant certiorari to consider such essentially "academic" issues. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

2. Petitioner asserts (Pet. 14-15) that the court of appeals' decision "disregards the teachings from this Court" in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), and "conflicts" with the holdings of the Ninth Circuit in *Kimball* v. *Callahan*, 493 F.2d 564, cert. denied, 419 U.S. 1019 (1974) (*Kimball I*), and *Kimball* v. *Callahan*, 590 F.2d 768, cert. denied, 444 U.S. 826 (1979) (*Kimball II*). That is not so. The court of appeals correctly recognized that its decision

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[12] Moreover, even members of the Ute Indian Tribe cannot hunt big game on trust lands within the Reservation without a permit, which petitioner did not obtain before committing the acts in October 1993 that gave rise to his conviction. Pet. App. 4a, 68a. Hence, even if petitioner could obtain a judicial declaration that he was a member of the Tribe as of October 1993, he could still be subject to prosecution by the Tribe (even if not by the United States, see 18 U.S.C. 1152) for hunting without a permit on tribal lands. See 1993/94 Ute Tribe/UDC Big Game Proclamation G1a, 2 (attached as Exhibit B to Brief of Ute Indian Tribe as *Amicus Curiae* in district court) ("any person" who "engage[s] in hunting without first obtaining the proper permit and tag" on Ute tribal lands "shall be subject to criminal prosecution in a court of competent jurisdiction and shall [be] subject to civil penalties, as provided by the Ute Law and Order Code").

is consistent with *Menominee Tribe* and the *Kimball* cases. See Pet. App. 5a-11a.

In *Menominee Tribe*, the Court held only that the Menominee Indian Termination Act did not extinguish *sub silentio* the Tribe's right to hunt and fish on the lands that it had received under an 1854 treaty. 391 U.S. at 411-413. The Tenth Circuit has recognized, in accordance with *Menominee Tribe*, that the UTA likewise did not extinguish the hunting and fishing rights of members of the Ute Indian Tribe, including the mixed-blood Utes, such as petitioner's parents, who ceased to be members of the Tribe under the UTA. *United States* v. *Felter*, 752 F.2d 1505, 1509-1512 (10th Cir. 1985); see also Pet. App. 9a (discussing *Felter*). *Menominee Tribe* does not address any issue concerning the hunting and fishing rights of individuals, such as petitioner, whom a Tribe has never included on its membership roll.

In the *Kimball* cases, the Ninth Circuit held that individuals who had withdrawn from the Klamath Tribe pursuant to the Klamath Termination Act, and consequently had their interest in tribal property converted into money and paid to them, retained a treaty right to hunt and fish on lands that had been part of the Tribe's reservation. *Kimball I*, 493 F.2d at 568-569; *Kimball II*, 590 F.2d at 772-775. That aspect of the Ninth Circuit's *Kimball* decisions is consistent with the Tenth Circuit's decision in *Felter* as discussed above. The Ninth Circuit additionally held in *Kimball II* that the descendants of those who had withdrawn from the Tribe possessed a right to hunt and fish on those lands. 590 F.2d at 775-776. The Ninth Circuit explained, in its relatively cursory treatment of the issue, that the Klamath Termination Act "did not affect the power of the Tribe to take any

action under its constitution and bylaws consistent with the Act," including the Tribe's powers to "establish[] criteria for membership in the Tribe" and to regulate the exercise of tribal hunting and fishing rights. *Id.* at 776. As the Tenth Circuit recognized (Pet. App. 11a), therefore, the Ninth Circuit's holding appears to rest on the fact that the Klamath Tribe itself considered the descendants to be members who had a right to hunt and fish on tribal lands. The Ute Indian Tribe, in contrast, does not consider petitioner to be a member of the Tribe. In view of that crucial factual difference between the present case and *Kimball II*, no square conflict can be said to exist between the Ninth and Tenth Circuits on any issue presented here.

In any event, even if any conflict did exist between the two cases, it would not be significant enough to warrant the Court's review. As petitioner concedes (Pet. 9-10), the tribal termination statutes of the 1950s are "now largely repealed," and the "few" that remain involve Tribes in the Ninth and Tenth Circuits. Even the Klamath Termination Act at issue in the *Kimball* cases was repealed in 1986. See Act of Aug. 27, 1986, Pub. L. No. 99-398, § 2, 100 Stat. 849 (codified at 25 U.S.C. 566). It thus appears unlikely that the "conflict" alleged by petitioner could deepen in the future.

3. Petitioner next contends (Pet. 20-26) that the UTA violates the First Amendment by infringing upon his right to associate with the Ute Indian Tribe or, alternatively, the right of the Tribe, as it existed before the UTA, to associate with all of its members, full-blood and mixed-blood Utes alike. Petitioner's position is without merit and is unsupported by any relevant authority.

The UTA does not prevent anyone—including the Tribe, its present or former members, or their descendants—from associating with anyone else. As noted above, the UTA merely specifies the criteria for tribal membership as of April 5, 1956, when the final rolls of full-blood and mixed-blood Utes were published in the Federal Register. 25 U.S.C. 677d. The UTA expressly authorizes the Tribe itself, through its Constitution, bylaws, and ordinances, thereafter to "control[] and determin[e]" the criteria for membership. The Tribe's authority to do so, independently of the UTA, has since been judicially recognized. See *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1034 (D. Utah. 1985) ("Nowhere is there any indication that Congress intended [in the UTA] to take away the Tribe's right to determine its own membership."). It is the Tribe's own Constitution, bylaws, and ordinances, and not the UTA, that have prevented petitioner and others from associating with the Tribe as members.[13]

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[13] This case would not be an appropriate vehicle, moreover, to address whether the UTA violates the Tribe's associational rights. As the court of appeals recognized (Pet. App. 16a), petitioner's standing to assert the First Amendment rights of the Tribe is dubious, at best. Petitioner has never been a member of the Tribe. Although the Court has sometimes allowed a criminal defendant to assert the constitutional rights of a third party, see *Powers* v. *Ohio*, 499 U.S. 400 (1991), the Court has required, *inter alia*, that the criminal defendant have suffered an "injury in fact" that is traceable to the asserted violation of the third party's rights. *Id.* at 410-411; *Singleton* v. *Wulff*, 428 U.S. 106, 112-113 (1976). As explained in the text, petitioner's injury flows not from the UTA, but from the Tribe's own decision not to admit him to membership or to permit him to hunt on tribal lands. Nor does there exist the sort of "hindrance to the third party's ability to protect his or her own in-

4. Petitioner further asserts (Pet. 26) that the UTA is "[r]acially discriminatory legislation" in violation of the equal protection component of the Fifth Amendment. This Court has recognized, however, that Congress does not engage in invidious racial discrimination by singling out tribal Indians for distinctive treatment. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."); *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974).

Petitioner argues (Pet. 26), without citation to any supporting authority, that those principles should not apply in this case because the UTA distinguishes among individual members of the Tribe based on the amount of Indian blood that they possess. But such distinctions are a necessary, and permissible, incident of Congress's providing special treatment to Indians. See *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965) ("[I]t seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood."), aff'd, 384 U.S. 209 (1966).

The UTA, moreover, simply adopted distinctions based on Indian blood that had already been drawn by the Tribe itself.[14] And the UTA expressly authorized

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terests," *Powers*, 499 U.S. at 411, that would permit petitioner to assert the Tribe's associational rights.

[14] See H.R. Rep. No. 2493, *supra*, at 2 ("The Ute Tribe, of the Uintah and Ouray Reservation in Utah, consists of two

the Tribe, after 1956, to adopt different criteria, if it so chose, to define tribal membership. It is thus the Tribe's own definition of membership, which petitioner does not challenge here, that has caused him to be treated differently from full-blood Utes. It is not the UTA.

5. Finally, petitioner contends (Pet. 27-28) that the court of appeals' decision abrogates the rights to hunt and fish on tribal lands that once belonged exclusively to the Uintah Band, of which his ancestors were members, under an Executive Order issued in 1861 and confirmed by Congress in 1864. See Act of May 5, 1864, ch. 77, 13 Stat. 63. The court of appeals concluded, based on the text of the Tribal Constitution, that the Uintah Band ceased to have any distinct hunting and fishing rights after 1937, when the Uintah, Whiteriver, and Uncompahgre Bands united to form the Ute Tribe. Pet. App. 13a-14a. The court of appeals' analysis of the Tribal Constitution presents no issue of recurring significance that warrants this Court's review.

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distinct groups—the fullblood group and the mixed-blood group."); *id.* at 3 (Assistant Secretary of the Interior notes that the UTA adopted the definitions of full-blood and mixed-blood "[a]s used by this tribe"); see also *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 143 (1972) ("The [UTA] was the result of proposals initiated by the tribe itself. * * * The tribe also drafted the Act.") (internal citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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